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No. 202

In the Supreme Court of the United States

OCTOBER TERM, 1953

HOWETH M. MILLS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 205)[1] is reported at 206 F. Supp. 239.[2] The opinion of the United States

[1] "R." refers to the separately bound printed appendix to the Government's (appellant's) brief filed in the court of appeals, nine copies of which petitioner has filed in this Court. "Pet. App." references are to the appendix to the petition for a writ of certiorari.

[2] The opinion of the district court rendered upon the Government's separate action to enforce the marketing order, pursuant to 7 U.S.C. 608a(6) (R. 96), is reported at 185 F. Supp. 709. The opinion of the district court rendered upon denial of petitioners' application for a stay of enforcement of the foregoing judgment (R. 107) is reported at 187 F. Supp. 314.

Court of Appeals for the Fourth Circuit (Pet. App. 1a) is reported at 315 F. 2d 828. The opinion of the court of appeals rendered upon denial of petitioners' application for a stay of its mandate (Pet. App. 21a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1963 (Pet. App. 1a). The petition for a writ of certiorari was filed on June 10, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture erred in refusing to admit additional evidence in an administrative proceeding to review the validity of a milk marketing order promulgated after a full evidentiary hearing in which petitioners participated.

2. Whether the Secretary was acting within his discretion in including the Maryland counties on the "Eastern Shore" of Chesapeake Bay within the ambit of the marketing order.

3. Whether the Secretary's findings of fact met the requirements of the Agricultural Marketing Agreement Act of 1937.

STATUTE INVOLVED

The pertinent sections of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*, are set forth in the Appendix, *infra*, pp. 36–50.

STATEMENT

1. INTRODUCTION

Petitioners seek to have the Court review a decision of the Fourth Circuit upholding the validity of Federal Milk Marketing Order No. 16. On June 17, 1963, the Court denied a petition for a writ of certiorari filed by another party seeking review of that same decision, *Willow Farms Dairy, Inc., et al.* v. *Freeman*, No. 1121, October Term, 1962.[3] Petitioners here base their challenge on different grounds.

The instant litigation involves concurrent actions under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, *et seq.* One is an enforcement action brought by the United States under 7 U.S.C. 608a(6) to obtain the compliance of petitioners Howeth M. Mills and Crawford Mills, co-partners of the Mills Dairy Products Company, with Federal Milk Marketing Order No. 16 (originally numbered 127) issued by the Secretary of Agriculture. The other was brought by these petitioners against the Secretary, seeking judicial review of the Milk Marketing Order and challenging its validity.

2. THE MARKETING ORDER

Under the Agricultural Marketing Agreement Act, the Secretary of Agriculture is authorized, under certain conditions, to establish "marketing areas" and

[3] The court of appeals, in a single opinion, disposed of a number of appeals involving challenges by several parties to the validity of this marketing order. Before certiorari was denied in *Willow Farms*, the Solicitor General advised the Court by letter dated June 12, 1963, of the pendency of the *Mills* petition, but urged that the issues were distinguishable.

to regulate companies marketing certain agricultural commodities, including milk, in those areas. Before the Secretary may issue an order establishing a marketing area, the Act requires that "he shall give due notice of and an opportunity for a hearing upon a proposed order." 7 U.S.C. 608c(3). If he finds "upon the evidence introduced at such hearing" that the proposed order will tend to effectuate the policy of the Act, he may then issue the marketing order. 7 U.S.C. 608c(4).

In this case, the Secretary gave due notice of public hearings, at which he intended to consider a proposal for a milk marketing order covering the City of Baltimore and Maryland counties surrounding upper Chesapeake Bay, including counties on the "Eastern Shore" of the Bay. Petitioners, among others, had notice of the hearings and participated in the proceedings (R. 108).

On the basis of the evidence introduced at the public hearings, the Secretary issued his "Decision on Proposed Marketing Agreement and Order," 24 F.R. 9441, *et seq.* (R. 1–49). He found, *inter alia* (R. 48), that the "proposed marketing agreement and order and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act." He further found that the minimum prices to be paid to dairy farmers for milk, which the order established, would reflect "the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area" and would "insure a sufficient quantity of

pure and wholesome milk, and be in the public interest."

In accordance with that decision, the Secretary promulgated Milk Marketing Order No. 127, now No. 16, on December 31, 1959, 24 F.R. 11071, *et seq.* (R. 50-81). The order regulates the marketing of milk in a region centered on Baltimore, Maryland, and encompasses that city, together with surrounding Maryland counties on the western and eastern shores of Chesapeake Bay, *viz.*, "The Upper Chesapeake Bay Milk Marketing Area."

The provisions of this marketing order (in common with approximately 70 similar Federal Marketing Orders) operate directly upon the companies engaged in the business of selling and distributing milk and its products in the area. Under the Order, these regulated milk companies[1] are each required to pay not less than certain uniform minimum prices established by the Secretary for milk which they purchase from their dairy farmer suppliers. The applicable minimum price depends upon the use made by the milk company of the milk it purchases, milk to be used in fluid form (Class I) being priced higher than milk

[1] The Agricultural Marketing Agreement Act governs the regulation by the Secretary of Agriculture of many diverse agricultural commodities. The Act refers to those who raise these commodities as "producers" and to those who distribute and market them as "handlers." As this case involves only the regulation of milk marketing, we shall refer here to the principals by their common descriptions, "farmers" and "milk companies."

[2] The Act also permits additional price differentials based upon such factors as the butterfat content of the milk, transportation factors, etc., 7 U.S.C. 608c(5)(A). None of these differentials are involved in these proceedings, however.

for manufacturing into such items as butter and cheese (Class II). Milk that must be disposed of for manufacturing purposes is known as "surplus" and has traditionally commanded lower prices on the open market.[6]

The marketing order does not require the milk companies to pay those minimum class prices directly to the dairy farmers. Rather, as authorized by Section 8c(5) of the Act,[7] it contains provisions to insure that the rate of return to each dairy farmer for his milk is the same, regardless of the use made of it by the company to which he delivers the milk. The order accomplishes this objective by means of a market-wide "pool." Monthly, each regulated milk com-

[6] In order to insure that it will at all times be able to meet the fluctuating daily consumer demand for fluid milk, the industry must carry a "surplus" of 20% over the average demand; however, because the herds naturally produce significantly more milk in the spring, to meet the needs in November necessitates more than 50% surplus in June. "Surplus" milk is not wasted: it is manufactured into butter, cheese, powdered milk and similar items. However, these manufactured items are in direct competition with similar products made across the nation, often in areas with lower production costs and from milk of lower quality. Consequently, "surplus" milk can be sold only at a greatly reduced price. The cut-throat competition among the farmers for the more profitable fluid milk outlets led to violence and business practices which jeopardized the vital fluid milk supply. The Agricultural Marketing Agreement Act was enacted to control the situation. This Court has in many cases considered the problems of the milk industry outlined above. See, *Nebbia* v. *New York*, 291 U.S. 502, 515-522; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 548-550; *H. P. Hood & Sons* v. *United States*, 307 U.S. 588; *Stark* v. *Wickard*, 321 U.S. 288; *United States* v. *Ruzicka*, 329 U.S. 287; *H. P. Hood & Sons* v. *Du Mond*, 336 U.S. 525.

[7] 7 U.S.C. 608c(5).

pany reports its total sales of milk in each price class to a Market Administrator. That official totals the value of all the reported sales and divides that sum by the quantity of milk sold. The result is, of course, a weighted average between the Class I and the lower Class II price. This monthly average price, known as the uniform or "blend" price, is the minimum price required to be paid by the regulated milk companies to each farmer for his milk, regardless of the use to which the company has put it.

In recognition of the fact that all companies can be expected to have either a higher or a lower fluid milk utilization rate than the market-wide average (which the blend price reflects) and thus will be obligated (under the established class prices) for either more or less money than the amount paid to their farmers as the uniform blend price, the order established a clearing house operation known as the producer settlement fund. Each company either pays into, or draws from, the fund the difference between the uniform blend price to its farmers and the value of its milk computed at the class prices. The operation of the fund has no effect upon the class prices.

Before the Upper Chesapeake Bay Milk Marketing Order could be placed into operation, the Act required the Secretary of Agriculture to obtain the agreement of the milk companies to be regulated thereby, 7 U.S.C. 608c(8), or, failing that agreement, the approval of "at least two-thirds of the producers * * * who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in

such marketing agreement, or order * * *." 7 U.S.C. 608c(9)(B)(i).

The milk companies declined to give their consent to the proposed order. The Secretary thereupon submitted the proposed marketing order for the farmers' approval by means of a referendum. The result was 1,663 votes in favor of the proposed Order and 192 against (R. 192).

Accordingly, on December 31, 1959, the Secretary officially promulgated the order as Milk Marketing Order No. 127 (later renumbered 16); 24 F.R. 11071, *et seq.* (R. 50–81). The Order became effective for reporting purposes on January 1, 1960, and for purposes of minimum price payments on February 1, 1960.

3. THE INSTANT CASES.

Petitioners are the co-partners of the Mills Dairy Products Company,[1] which is engaged almost exclusively in the processing and sale of fluid milk in counties in Maryland located on the "Eastern Shore" of Chesapeake Bay (R. 211). All these counties are included within the Upper Chesapeake Bay Milk Marketing Area (R. 53). Mills Dairy is a fully regulated milk company ("handler") under the terms of Marketing Order No. 16 (R. 99).

From the Marketing Order's inception, petitioners refused to comply with its minimum price provisions, paying substantially less than the established Class I

[1] While two other milk companies have joined in the petition, neither is presently in business and the sole proprietor of Twilley's City Dairy is deceased. For this reason, reference is made only to the Mills petitioners.

price for the milk which they used for fluid purposes. Accordingly, pursuant to 7 U.S.C. 608a(6), the United States filed suit in the federal district court for Maryland to enforce petitioners' compliance with the Marketing Order (R. 81). On June 30, 1960, the district court granted the government's motion for summary judgment and ordered petitioners to comply with the Marketing Order (R. 96), and on September 2, 1960, denied Mills' motion for a stay, again directing compliance with the Marketing Order (R. 107). Despite these court orders, petitioners did not pay to the Market Administrator the amounts they owed to the producer settlement fund under Order No. 16.

Petitioners challenged the validity of the Milk Marketing Order in an administrative review proceeding before the Secretary of Agriculture pursuant to 7 U.S.C. 608c(15)(A). In that proceeding, petitioners sought to introduce additional evidence and to try *de novo* the question of whether the Secretary's inclusion of the "Eastern Shore" counties within the marketing area was warranted. The hearing examiner declined to admit this new evidence. Petitioners were permitted to take an interlocutory appeal from the examiner's ruling to the Secretary, who upheld the hearing examiner's decision. (App., *infra*, pp. 21–36.) The Secretary noted that (App., *infra*, p. 30), "section 8c(4) of the act (7 U.S.C. 608c(4)) requires that in issuing [a marketing] order the Secretary shall find *upon the evidence introduced at the promulgation hearing*, that the issuance of the order 'and all the terms and conditions thereof' will tend to effectuate the declared policy of the

act." Accordingly, he ruled that "No new evidence, that is evidence other than the record evidence bearing upon the validity of the issuance of the order, would be received in such a case" (App., *infra*, p. 30). From the final decision of the Secretary rejecting their challenge (R. 118–149), petitioners sought judicial review in the district court as provided in 7 U.S.C. 608c(15)(B).

On June 13, 1962, the district court rendered an opinion, *sub nom. Willow Farms Dairy, Inc.* v. *Freeman*, 206 F. Supp. 239 (R. 205), and on June 26, 1962, entered its final judgment (R. 240) which held Milk Marketing Order No. 16 invalid. The court also entered an order dissolving its prior injunction and released petitioners from the minimum price requirements of the Marketing Order, which it had ordered paid to the producer settlement fund in the prior enforcement action (R. 243). While the district court rested its decision on several grounds, the only one urged by petitioners here is its holding that the Marketing Order was discriminatory because it included within the same marketing area both the City of Baltimore and surrounding Maryland counties, among others those on the "Eastern Shore" of Chesapeake Bay. The other grounds here asserted by petitioner (relating to the rejection of new evidence and the findings of the Secretary) were summarily rejected by the district court (R. 235).*

On March 11, 1963, the court of appeals reversed the judgment of the district court. The appellate court

* See also, Point 4 of the opinion of the district court rejecting Mills' earlier application for stay of enforcement, 187 F. Supp. 314, 319 (R. 114–115).

considered in detail, and rejected, each of the grounds asserted by the petitioners as a basis for holding the Marketing Order invalid. It also rejected petitioners' claim that they were entitled to a *de novo* hearing before the Secretary on the validity of the Marketing Order. The court of appeals observed that, under 7 U.S.C. 608c(15)(A) (Pet. App. 14a):

> Relief [from a marketing order] may be asked solely on the ground that the Order "is not in accordance with law." Obviously, such a review is based upon the record made and concluded in promulgation of the Order. No additional proof is permissible; the Order must stand or fall upon the proof and findings there. [Citing cases.] To allow evidence would be to reopen, rather than to judge, the promulgation proceeding.

It concluded that the Secretary had fully complied with the statutory requirements and ordered the Marketing Order enforced (Pet. App. 19a).

On April 26, 1963, the court of appeals denied the petitioners' motion for a stay of its mandate for reasons stated in its opinion on that motion (Pet. App. 23a). Notwithstanding the denial of a stay, judicial sanctions were necessary to obtain petitioners' compliance with the Marketing Order.

ARGUMENT

This Court has previously held the Agricultural Marketing Agreement Act of 1937 to be constitutional and has approved, as authorized by that Act, milk marketing orders corresponding in all essentials to the one here questioned. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, and *H. P. Hood & Sons* v.

United States, 307 U.S. 588. The court below determined that the marketing order under challenge was supported by substantial evidence in the administrative record and that its issuance complied with all statutory requirements. The decision is plainly correct. Thus, while these petitioners endeavor to raise issues different from those presented in the unsuccessful petition of another milk company from the same decision (see *supra*, p. 3), there remains no occasion for review by this Court.

1. Before the Secretary of Agriculture may promulgate an order establishing a milk marketing area, Section 8c(3) of the Act [9] requires him to give notice and opportunity for hearing on the proposed order. In this case, on January 14, 1959, the Secretary gave public notice of a proposal to establish a marketing area covering the region centered around Baltimore. 24 F.R. 428. In the notice, the terms of the proposed order were set forth in full. They expressly indicated that the proposed marketing area would extend to Maryland counties on the "Eastern Shore" as well as those on the western or Baltimore side of Chesapeake Bay. 24 F.R. 429.[10]

Pursuant to the notice, during February and March of 1959, the Secretary held public hearings in Baltimore on the proposed marketing order (R. 1). Petitioners were represented at those hearings, with the

[9] 7 U.S.C. 608c(3).

[10] Section 1027.6 of the proposed order listed by name, as under consideration for inclusion in the marketing area, the counties of Cecil, Queen Annes, Kent, Caroline, Talbot, Dorchester, Wicomico, Somerset and Worcester, which together comprise the "Eastern Shore" of Maryland.

full right to submit evidence and to make their views known on the proposal. In due course the Secretary handed down his decision on the proposed order (R. 1–49), based "[u]pon the evidence adduced at the hearing" (R. 2). Among other matters, the Secretary decided that the establishment of the proposed marketing area, including the "Eastern Shore" counties, was warranted.

The petitioners, who conduct their milk business exclusively on the Eastern Shore, objected to having that area included in the marketing order. They petitioned the Secretary for relief as provided under Section 8c(15)(A) of the Act,[12] alleging in substance that the inclusion of the Eastern Shore was not in accordance with law. The Secretary ruled that this question must be decided on the basis of the evidence presented at the promulgation hearing upon which the marketing order was based. Accordingly, he excluded petitioner's additional evidence, offered in an attempt to litigate the matter *de novo*.

This rejection of their offer of additional evidence, petitioners contend, denied them due process of law and violated the Agricultural Marketing Agreement Act, the Secretary's own regulations and the Administrative Procedure Act. These claims, as both the district court (R. 235) and the court of appeals (Pet. App. 14a) held, are without substance.

That the Constitution does not require a trial *de novo* was made clear in *Inland Empire Council* v. *Millis*, 325 U.S. 697. The Court there observed that (325 U.S. at 710) "[t]he requirements imposed by

[12] 7 U.S.C. 608c(15)(A).

that guaranty [of due process] are not technical, nor is any particular form of procedure necessary." The Court went on to reaffirm its holding in *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152–153, that the "demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." That requirement was fully met in this case.

Nor does the Act require a trial *de novo* in a review proceeding under Section 8c(15)(A).[13] In Section 8c(4) of the Act[14] Congress specifically provided that the "terms and conditions of a marketing order must be based "upon the evidence introduced at such [promulgation] hearing." It is thus clear that the Secretary's marketing order must stand or fall on the basis of the record there established. In other words, as both courts below held, the Secretary properly looked only to the promulgation record when petitioners challenged the validity of the marketing order as "not in accordance with law."

Nothing in Section 8c(15)(A) is to the contrary. The term "hearing", as used in that section does not

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[13] 7 U.S.C. 608c(15)(A).

[14] 7 U.S.C. 608c(4).

[15] 7 U.S.C. 608c(15)(A) provides:

"Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Sec-

require a trial-type, evidentiary procedure in all cases, as petitioners suggest (Pet. 9–11).[9] The meaning to be given that word depends on the context of its use. As the Court observed in *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 317, "[t]he answer will not be found in definitions of hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen." Here, where the Act requires a marketing order to be based on a given record, the Secretary properly conducted an appellate type of hearing on the question of whether the evidence in the record, considered as a whole, indeed supported the marketing order. As the court of appeals stated (Pet. App. 14a), "[t]o allow evidence would be to reopen rather than to judge, the promulgation proceeding." Accord, *Beatrice Creamery Co. v. Anderson*, 75 F. Supp. 363, 367 (D. Kan.); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo.), affirmed, 155 F.2d 87 (C.A. 8); *Sprague Dairy Co. v. Anderson*, 6 A.D. 729 (N.D. Ill.).[10]

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retary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law."

[10] See also, Davis, *Administrative Law Treatise* (1958 Ed.), § 7.01.

[11] *New York State Guernsey Breeders' Coop. v. Wickard*, 141 F. 2d 805 (C.A. 2, 1944), cited by petitioners (Pet. 10), is not a contrary holding. The question here presented was not raised or discussed by the court in that case. The Secretary has regularly ruled in later cases that the validity of a marketing order may be challenged only on the basis of the record made in the promulgation hearing. See the Secretary's decision on the evidence in this case, citing many such rulings, App., *infra*, pp. 34–35.

Nor did the hearing examiner's refusal to admit new evidence and conduct a trial *de novo* violate the Secretary's own regulations. Since additional evidence may not be considered in a proceeding to review the validity of a marketing order, under the Secretary's Rules of Practice the examiner properly excluded the new evidence as irrelevant and immaterial. 7 C.F.R. § 900.60(d) (Pet. App. 51a–54a).

Petitioners' reliance upon provisions in the Secretary's Rules of Practice relating to the admission of evidence is misplaced. Like the Federal Rules of Civil Procedure governing the district courts, the Secretary's Rules are a general guide to practice and procedure. Whether a given rule comes into play, of course, depends entirely on the nature of the case. In the circumstances here presented, no *de novo* evidence was appropriate. Cf. Rule 56, Fed. R. Civ. P. See, also, *United States* v. *Bianchi*, No. 529, October Term, 1962, decided June 3, 1963.

Finally, the Administrative Procedure Act affords petitioners no support. In the Agricultural Marketing Agreement Act Congress specifically provided that marketing orders were to be based on evidence submitted to the Secretary at a public hearing held before the promulgation of the proposed order. 7 U.S.C. 608c (3), (4). Petitioners evidently withheld some of the matters which they should have presented there. The Administrative Procedure Act does not entitle them to ignore specific procedures established by Congress. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492.

2. Petitioners' object to the geographical bounds of the marketing area as drawn by the Secretary. In essence, they urge that there are two distinct milk markets, Baltimore City and the counties on the western side of Chesapeake Bay and the "Eastern Shore." Only the Baltimore side of the bay, they claim, had a milk surplus, and the Secretary therefore could not extend regulation to the Eastern Shore.

This argument goes only to the sufficiency of the evidence in the record to support the Secretary's decision on the proper configuration of the market, as this Court has already found nothing *per se* improper in the inclusion of urban and rural communities in one milk marketing area. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533.[5] As the court of appeals found (Pet. App. 11a–14a), there was substantial evidence to support the Secretary's conclusion that the milk surplus problem, extant or incipient, threatened the stability of milk marketing in the entire area included in his marketing order. For the administrative record reflected, and the Secretary found, *inter alia*: (1) that the milk companies with plants in Baltimore City sell more fluid milk on the "Eastern Shore" than do companies in petitioners' position (R. 8-12, 134–40); (2) that the milk companies located in Baltimore compete with companies on the "Eastern Shore" for dairy farmers to supply them (R. 6-7); (3) that the prices paid by "Eastern Shore" companies for their milk were directly related to the

[5] In *Rock Royal* the milk market area there approved consisted of New York City and the then rural or suburban counties of Westchester, Nassau and Suffolk in New York State.

prices paid by the Baltimore City companies (R. 4–5, 142); and (4) that 86 farmers on the Eastern Shore market their milk with "Baltimore" companies (R. 137), almost three times the number who sell to Mills Dairy (Brief for Mills Dairy in the court of appeals, p. 39).

Petitioners' reliance upon the existence of a municipal ordinance, purporting to bar petitioners from selling milk in Baltimore City, is misplaced. As the court of appeals noted, "it does not appear that [petitioners] ever tried to enter Baltimore or, indeed, wished to do so." (Pet. App. 12a). Moreover, the ordinance is of doubtful validity. The municipal ordinance involved is of the type which bars from sale within the city limits milk or milk products not bottled at a plant located inside the corporate bounds of the city.[*] In *Dean Milk Co.* v. *Madison*, 340 U.S. 349, this court struck down such a municipal milk ordinance as unconstitutional. Furthermore, a Maryland court has already held the very Baltimore ordinance in question to be invalid insofar as it applies to sales of ice cream within the city limits. *Sapplee-Willis-Jones Milk Co.* v. *Huntington Williams* (Baltimore City Circuit Court, decided July 9, 1956). It is not the force of the municipal ordinance but business competition which has kept petitioners from selling in Baltimore.

[*] Art. 12, Sec. 15, Baltimore City Code (1950) provides in pertinent part:

"No permit to pasteurize milk, cream, ice cream or other dairy products for sale in Baltimore City shall be granted to any person, firm or corporation whose plant shall be located beyond the corporate limits of Baltimore City."

Petitioners' final attack on the configuration of the marketing area is in effect a challenge to the producer settlement fund. Petitioners complain that they are compelled to pay into that fund, and thus to "contribute financially to the solution of the Baltimore City marketing problem." (Pet. 17). This, in substance, is the often repeated argument that those companies which pay into the fund subsidize those companies that withdraw from it. This Court considered and rejected identical contentions in *United States* v. *Rock Royal Co-op., supra*, and *H. P. Hood & Sons* v. *United States*, 307 U.S. 588. The Court there pointed out that the milk companies have no financial interest at all in the producer settlement fund, 307 U.S. at 561, and held that equalization pools are properly authorized by the Act. See 307 U.S. at 571-73. The court of appeals so held here.

3. Petitioners' final complaint is directed at the findings of the Secretary, as they were expressed in the milk marketing order itself. Specifically, petitioners' objection is that the order "contains no findings to support [the Secretary's] ultimate conclusion but merely paraphrases the Act" (Pet. 22). Petitioners overlook the fact that, in addition to the formal findings set out in the marketing order, the Secretary also issued a decision in which he made additional findings (R. 1-49) and explained his reasons for promulgating that order. As the court of appeals noted (Pet. App. 8a), the Secretary's decision discussed "at considerable length" the questions of the need for milk marketing regulation in the upper Chesapeake Bay area. He explained in detail

the various factors which he considered in reaching his conclusion that regulation was necessary (R. 4–40). The court of appeals concluded that the Secretary's findings have "firm basis in the record" (Pet. App. 8a). Under these circumstances, petitioners have failed to demonstrate any cause for further review of the decision below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963.

APPENDIX

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 127–1

IN RE MILLS DAIRY PRODUCTS COMPANY, *ET AL.*,
PETITIONERS

Interlocutory Rulings on Admissibility of Evidence

[19 A.D. 807]

I

This is a proceeding under Section 8c(15)(A) of the Agricultural Adjustment Act (1933), as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 and subsequent amendments (7 U.S.C. 601 *et seq.*). Section 8c(15)(A) of the act (7 U.S.C. 608c(15)(A)) provides:

> Any *handler* subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith *is not in accordance with law* and praying for a modification thereof or to be exempted therefrom. * * *. [Emphasis supplied.]

This document is caused to issue because petitioners have requested review of rulings of the hearing examiner holding inadmissible certain testimony offered by petitioners at the hearing in the proceeding.

II

The petitioners are five handlers of milk subject to Order No. 127 issued under the act. The order regulates the handling of milk in the "Upper Chesapeake Bay" marketing area which includes the counties on the Eastern Shore of Maryland in addition to the counties of Baltimore, Anne Arundel, Harford, Howard, the city of Baltimore and the town of Laurel, Maryland. The petitioners distribute milk in some of these counties on the Eastern Shore of Maryland and attack the inclusion of the counties in the marketing area defined under the order. They also raise other objections to the issuance of the order generally.

The protested order was issued December 28, 1959 (24 F.R. 11071, after the usual notice, public hearing, briefs, recommended decision (24 F.R. 7530), exceptions to the recommended decision, final decision including findings and conclusions and producer referendum. Among the numerous issues for decision following the public hearing was the matter of including the Eastern Shore counties in the marketing area covered by the order and this was the subject of specific findings and conclusions in the final decision.

III

On December 31, 1959, petitioners, who are some of the handlers on the Eastern Shore subject to the order, filed a petition under section 8c(15)(A) of the act. The petition alleged that the order was a nullity because the Secretary did not make findings of fact as to prices which the petition claimed are a "threshold jurisdictional statutory requisite." The petition also alleged irreparable injury to petitioners in the way of interference with their freedom to contract for milk, submission to reporting and auditing requirements, etc. An application for interim relief filed by

petitioners January 11, 1960, was denied January 26, 1960. On January 27, 1960, respondent filed an answer to the petition. On January 29, 1960, Hearing Examiner Clarence H. Girard, to whom the case had been assigned, granted a motion by Brice G. Twilley to become a party petitioner in the proceeding, and scheduled hearing upon the petition and answer for February 24, 1960, in Baltimore, Maryland.

On February 4, 1960, petitioners filed an amended petition. The body of the petition comprises 24 legal-size pages. Because of the filing of the amended petition and the necessity for an answer, the hearing examiner cancelled the scheduled hearing. On February 19, 1960, respondent filed an application to dismiss designated portions of the amended petition. Upon request of petitioners, they were given an extension of time to March 24, 1960, for the filing of an answer to the application to dismiss which would otherwise be due March 14, 1960. On March 24, 1960, petitioners filed their answer to respondent's application to dismiss and requested oral argument thereon. Pursuant to this request, oral argument was held before the Judicial Officer on April 11, 1960, in Washington, D.C.

At the oral argument upon the application to dismiss and the answer thereto, petitioners withdrew several paragraphs of the amended petition. The application to dismiss was denied by the Judicial Officer on April 13, 1960. In the ruling issued, the Judicial Officer discussed the complaints of the respondent that the amended petition was vague, ambiguous, prolix, argumentative and therefore impossible to answer appropriately and also respondent's objection that the amended petition referred to evidence outside the record upon which the order was promulgated. The Judicial Officer ruled that in the interests of expedition the proceeding should continue on the basis of

the amended petition although it contained a good deal of argument since most if not all of the materials in the petition seemed to deal with the issue of whether the issuance of the protested order was supported by the evidence in the promulgation record, a cause of action cognizable in an 8c(15)(A) proceeding under the act. He stated also that while this is a *review* proceeding and not a *de novo* proceeding that questions as to the admissibility of evidence other than the promulgation record could be handled as they might arise in later stages of the proceeding.

Respondent filed an answer to the amended petition April 27, 1960. On May 4, 1960, Hearing Examiner Girard set the proceeding for hearing June 7, 1960, in Baltimore, Maryland. On June 2, 1960, petitioners requested a postponement of the hearing to June 28, 1960, which was granted by the hearing examiner. On June 30, 1960, petitioners asked for a further postponement of the hearing to a later date which was also granted by the hearing examiner. On July 5, 1960, the hearing examiner set the case for hearing August 3, 1960, in Baltimore. On July 26, 1960, petitioners filed a motion to change the place of hearing to Cambridge, Maryland, (1) for the convenience of petitioners and (2) because petitioners planned to call about 50 witnesses many of whom might be unable to travel to Baltimore. Respondent opposed the change upon the general ground that 50 "disinterested witnesses" engaged in farming, industry, etc., upon the Eastern Shore would not have testimony relevant to the issues in the proceeding. The hearing examiner granted the motion upon the stated ground of convenience to the petitioners and pointed out that since this is a *review* proceeding there were problems to be considered as to whether the number of witnesses referred to in petitioners' motion were going to

be offered to retry *de novo* the question as to whether the Eastern Shore counties should be included in the marketing area regulated by the order. He stated that these problems would be gone into with counsel at the start of the hearing.

IV.

The hearing commenced as scheduled on August 3, 1960, in Cambridge, Maryland. Pursuant to the hearing examiner's announcement in his order granting removal of the hearing to Cambridge, Maryland, the first order of business was discussion and argument as to whether new evidence, that is evidence outside the record upon which the order was issued, was relevant and material and therefore admissible in this proceeding. Petitioners also were granted permission to amend their complaint to charge violation of the Federal Reports Act of 1942 (5 U.S.C. §139) in the promulgation of the order.

Petitioners put in as witnesses four of the petitioners; seven milk producers who deliver milk to petitioner Mills Dairy Products Company of Cambridge, Maryland; two producers who deliver to petitioner Lewes Dairy of Lewes, Delaware; a newspaper editor and historian, Max Chambers; Rev. Edwin Horney, an ordained minister; and an economist and statistician with legal training, Max Malin.

In connection with all the testimony for petitioners except that of Chambers and Malin, the hearing examiner allowed petitioners, when he ruled out testimony, to make an offer of proof in the form of questions and answers. In the case of Chambers, who apparently planned to testify at considerable length about the isolation or "segregation" of the Eastern Shore of Maryland from the city of Baltimore and its

environs historically, culturally, economically, industrially, politically and otherwise, the hearing examiner required a statement as an offer of proof. In the case of Malin, it was also apparent to the hearing examiner that the witness would spend a great deal of time proffering his evaluations of the evidence in the promulgation record by means of questions and answers, and the hearing examiner ruled that offer of proof of the excluded testimony should be made by means of a brief statement. Rather than do this, petitioners requested the hearing examiner to certify his rulings concerning admissibility to the Judicial Officer for review at that stage. The hearing examiner denied the request on the authority of the rules of practice and prior decisions of the Judicial Officer under similar rules of practice for proceedings under other acts administered by the Department. Petitioners then sought and obtained on August 4, 1960, a recess of the hearing to seek an interlocutory review of the rulings before they continued with the proceeding. On August 17, 1960, petitioners requested such a review.

V

The hearing examiner was clearly correct in refusing to certify *at this stage* an appeal from his rulings excluding offered testimony. Section 900.55(c)(7) of the applicable rules of practice authorizes the presiding officer at the hearing to admit "or exclude" evidence; section 900.59 authorizes the presiding officer to rule upon all motions and requests made prior to the transmittal of the record to the Secretary by the hearing clerk for final decision in the proceeding; section 900.59(b) vests discretion in the presiding officer as to whether he shall certify any motion, request, etc., to the Secretary for decision prior to the transmittal of the record to the Secretary for final

decision in the proceeding; and section 900.60(d)(8) provides for the incorporation of offers of proof in the transcript when a presiding officer excludes evidence proffered for later review and reopening of the hearing if it is decided later by the Judicial Officer or the courts that the evidence covered by the offer should have been admitted. As we have said about similar departmental rules of practice, the rules provide that a presiding officer may either rule upon the admissibility of evidence or certify the question to the Secretary. If he does rule, the appeal must wait until after the hearing is concluded and the hearing officer files his report. See *In re Caggill*, 12 A.D. 1109 (1953). Otherwise, interlocutory appeals from hearing examiner's rulings during the course of hearings would flood the deciding officer.

VI

But in this case perhaps we should make an exception. Counsel for petitioners insist that they are being deprived of the "full and fair hearing" guaranteed by the Constitution of the United States and by section 8c(15)(A) of the act by the refusal of the hearing examiner to regard as relevant and material in the proceeding the evidence excluded. Consequently, although we should not do so as a general rule, we shall proceed to review the hearing examiner's rulings now as an interlocutory matter so that the proceeding may continue expeditiously.

As we stated at the outset, section 8c(15)(A) of the act provides for the filing of a petition by a *handler* stating that an order, a provision thereof or an obligation imposed in connection therewith is "not in accordance with law." The petitions involved are petitions filed pursuant to this provision of the act. As described above the original petition alleges

that certain jurisdictional findings were not made in connection with the issuance of the order. The amended petition recites under heading I the identity of the petitioners and under heading II that the original petition is incorporated by reference. Heading III constitutes the rest of the amended petition except the prayers for relief and consists of allegations in paragraphs numbered 1 through 51 inclusive together with unnumbered paragraphs appearing between numbered paragraphs. The lead sentence or the concluding sentence in practically all paragraphs alleges some deficiency in the promulgation record evidence to sustain the issuance of the order as a whole or the provisions of the order including the Eastern Shore of Maryland. Paragraph 1 states that the order is invalid because "it is not based on an integrated record consisting of probative evidence on all relevant factors in that * * *" and then follow allegations as to the insufficiency of the evidence: paragraph 2 complains of the absence of a finding that marketing conditions in the designated marketing area *were not found to be unstable* and the *absence of any record evidence* upon which such a finding could be made; paragraphs 3, 4 and 5 likewise attack a finding *as unsupported by the evidence in the promulgation record;* paragraph 6 attacks a statement in the promulgation decision concerning the spread between a cooperative's Class I price and blend price in 1955; paragraph 7 attempts to defeat certain statements *in the promulgation decision* by reference to *evidence in the promulgation record* and concludes by alleging that *the record* fails to sustain the need for an order; paragraph 8 concludes by claiming that the provisions of the order resting upon market instability *are not supported by the record;* paragraph 9 commences by saying that *the evidence of record* does

not support the inclusion of the Eastern Shore; paragraphs 10, 12 and 14 begin by contending that inclusion of the Eastern Shore *is not supported by the evidence in the record or is contrary to the evidence;* paragraphs 11 and 15 call such inclusion "unrealistic," "arbitrary" or "capricious;" paragraph 18 asserts that such inclusion defeats the purposes of the underlying statute because of the existence of the city of Baltimore's restrictive health regulations the effects of which were *not adequately considered in the promulgation of the order* and consequently *the record was legally deficient;* paragraphs 19 through 27 deal with the city of Baltimore's regulation or practice of not permitting distribution in Baltimore of milk processed and packaged on the Eastern Shore and the alleged ensuing inequities, invalidities, etc., and the petition complains that these facts "concerning which the record is voluminous" were ignored in the issuance of the order.

Continuing through the amended petition we find that paragraphs 29 through 34 recite the evils of undue restraints upon the marketing of milk through the pretext of health regulations and accuse the Assistant Secretary of failing to deal with this subject in a serious way "despite the record he had available;" paragraph 35 states that the order is fatally defective in that it fails to *reflect the uncontroverted evidence* that Eastern Shore milk producers will be disadvantaged by having to equalize with other producers for the marketing area; paragraph 36 urges the unconstitutional interference with interstate commerce in milk by State agencies and says that the order thereby is fatally defective; the remaining paragraphs are scattered allegations as to inadequacy from an economic standpoint of either the promulgation evidence or the findings and conclusions made in the promulgation decision.

It is seen from the foregoing examination of the amended petition that the petitioners are attacking the quasi-legislative or rule-making act of the Assistant Secretary in making the decision to promulgate Order No. 127. It is seen also that what they claim is "not in accordance with law" about the promulgation of the order concerns the evidence upon which the order was issued and the findings and conclusions in connection therewith. Consequently it seems to me that the petitioners themselves by their petition have fixed the outer boundaries of the scope of this proceeding because they are claiming *legal* errors in the promulgation of the order just as if their appeal were direct to an appellate court. No new evidence, that is evidence other than the record evidence bearing upon the validity of the issuance of the order, would be received in such case.

Moreover, section 8c(4) of the act (7 U.S.C. 608c-(4)) requires that in issuing an order the Secretary shall find *upon the evidence introduced at the promulgation* hearing, that the issuance of the order "and all the terms and conditions thereof" will tend to effectuate the declared policy of the act. Again, because the issuance of an order is formal rule-making under the Administrative Procedure Act, section 7 of that act (5 U.S.C. 1006(c)) provides that no rule shall be issued except "as supported by and in accordance with the reliable, probative, and substantial evidence."

VII

Generally the proffered testimony of petitioners and their producers ruled inadmissible consists of such items as the handler's financial structure, statements that the producers would not be satisfied with a lower price from petitioners than they have been

getting which would allegedly be the case if the petitioners have to pay part of their costs for milk into the marketwide pool under the order, and that the producers delivering to petitioners would then sell their milk in the Philadelphia market rather than the Baltimore market, except that in the case of petitioner Ott the offer of proof was to the effect that if Ott was not available to take his producers' milk they would have to sell their milk as Class II to a condensery. There is no explanation in the latter instance as to why Ott would not take the milk or why Ott's producers should prefer to sell their milk at the Class II price to a condensery instead of to Ott at a higher price, the uniform price under the order. Generally, the offers of proof as to the petitioners included some vague statements that they would have difficulty staying in business or "probably" would have to go out of business.

It is to be expected that handlers becoming subject to a Federal milk marketing order with a marketwide pool who have a utilization of milk higher than the marketwide average will not like to pay part of their costs for milk to the marketwide pool instead of paying only their own producers. It is natural too for their producers not to look upon such a plan favorably. But this is an inevitable result of the equalization authorized by the act; many handlers and producers have had to operate under the plan over the years and its constitutionality was upheld a long time ago in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533 (1939); and *H. P. Hood & Sons* v. *United States*, 307 U.S. 588 (1939).

I find no cause of action stated in the amended petition for which the evidence from petitioners and their producers that was excluded is relevant and ma-

terial. Too, as we have said above the challenge here is to the validity as a matter of law of the inclusion of the Eastern Shore counties in the marketing area and in this proceeding only *handlers* have standing to sue.

The excluded testimony of Horney and Chambers was offered apparently for the purpose of showing that the Eastern Shore of Maryland is segregated from, or is not "homogeneous" with, the Baltimore City area from the historical, ethnic, sociological, economic and industrial aspects. The excluded testimony does not deal with the production or marketing of milk. How such evidence has any relevant or material bearing upon the issues made by the amended petition escapes me. Besides, the testimony relates only to the lack of contribution by the Eastern Shore to the economy and culture of the Western Shore and says nothing about the traffic in the other direction. The kind of evidence offered is just as irrelevant as the question as to how much of that liquid (not milk) flows from the Western Shore to the Eastern Shore that baseball fans in the Washington, D.C., area are constantly told in song and story over television and radio comes from "the land of pleasant living" and is "brewed on the shores of the Chesapeake Bay."

I agree with the hearing examiner that the excluded testimony of Horney and Chambers is irrelevant and immaterial although I must concede that Chambers' depiction of the provincial, colonial and political history of the Eastern Shore is colorful.

The attempted testimony of Max Malin is a little different apparently. Counsel for petitioners seek to have Malin testify as an expert to the effect that the evidence in the promulgation record is inadequate, insufficient, etc., to warrant the findings and conclusions made in the final decision as to the issu-

ance of the order as a whole and as to the inclusion of the Eastern Shore in the regulated marketing area. The plan is to have counsel read each statement to this effect in the petition and to have Malin testify (under oath) that such statement is correct.

It seems to me that whether or not the promulgation record sustains the protested order is a matter of *law* and not of *opinion testimony*, either on behalf of the petitioners or of the respondent. These issues are the kind typically before the courts in appeals from decisions or orders made by administrative agencies upon a hearing record and I am not aware that any court has taken opinion testimony from experts as to the worth or probative value of the evidence in the administrative record rather than argument. The standard for adjudication under the act and in the light of the grievances listed in the petition here is whether the issuance of the order either as a whole or as it applies to the Eastern Shore is *in accordance with law*, the same criterion applicable in review by the courts of administrative action.

The limited scope of this proceeding for petitioners' grievances in their petition as ruled by the hearing examiner and by me herein is viewed by petitioners' counsel with horror as novel, revolutionary, unconstitutional, etc. As long as this is an *administrative* proceeding, they say, and the matter is still before the Secretary of Agriculture, they should have a full, evidentiary "hearing", because the word "hearing" in section 8e(15)(A) of the Act means a hearing for the taking of testimony. Aside from the fact that the petitioners in their petitions fixed the scope of the hearing as limited to examination of the promulgation record, it is well established that a "hearing," even an administrative "hearing," may mean in some cases only a "hearing" upon the applicable law. See *e.g.*,

Denver Union Stock Yard Co. v. *Producers Livestock Marketing Association*, 356 U.S. 282 (1958).

The mere fact that a handler files a petition does not automatically entitle him to an oral hearing devoted to adducing evidence immaterial and irrelevant to the issues in the proceeding. See, *e.g.*, *Crystal Lake Dairy Co.* v. *Brannan*, N.D. Illinois, Feb. 20, 1951, affirming *In re Crystal Lake Dairy Co.*, 8 A.D. 1 (1949). There is nothing new about this principle being applicable to 8c(15)(A) proceedings where handlers claim the promulgation record is inadequate or where they seek to try *de novo* such questions as the desirability or necessity for an order or amendment, whether there is instability in the market, whether the order tends to effectuate the policy of the act, etc. See *e.g.*, *Dairymen's League Cooperative Ass'n* v. *Brannan*, 173 F. 2d 57 (2d Cir. 1949), affirming *In re Dairymen's League Cooperative Ass'n.*, 5 A.D. 143 (1946) (exhibit excluded seeking to show price for cream sold in certain areas should be Class III instead of Class II-A as prescribed by order); *Heinemann Creameries, Inc.* v. *Benson*, E.D. Wisconsin, October 30, 1953, 13 A.D. 1242, affirming *In re Kewaskum Dairy Company*, 12 A.D. 1 (1953) (necessity for order); *Sprague Dairy Company* v. *Anderson*, N.D. Illinois, Nov. 14, 1946, 6 A.D. 729, affirming *In re Clearleaf Dairy Co.*, 4 A.D. 627 (1945) (inclusion of Will County, Illinois, in the marketing area of the Suburban Chicago milk order); *In re Charles P. Mosier, Jr.*, 16 A.D. 1209 (1957) (whether order amendment tended to effectuate declared policy of act); *In re Beatrice Foods Co.*, 15 A.D. 767 (1956), affirmed, N.D. Oklahoma, Feb. 25, 1957, 16 A.D. 177 (whether order amendment was necessary or tended to effectuate declared policy of the act); *In re Clover Leaf Dairy Co.*, 15 A.D. 339 (1956) (desirability of

order amendment); *In re Roberts Dairy Company*, 4 A.D. 84 (1945) (desirability of pricing formula in order); *In re William S. Wright*, 2 A.D. 327 (1943) (whether order regulating handling of oranges tended to effectuate declared policy of the act).

Petitioners' counsel contend that they have to make "a record" upon which to seek judicial review under section 8c(15)(B) and that therefore the proffered testimony should be received in evidence.[1] But the evidentiary facts are in the record, the promulgation record incorporated herein which petitioners assert in their petition does not support the contested order.

It might be asked why not take the evidence anyway for "what it is worth" or for the sake of good public relations. But the evidence is irrelevant and immaterial and both by law and by requests of the Judicial Conference of the United States administrative agencies are supposed to keep irrelevant and immaterial matter out of hearing records to be reviewed by the courts. Too, I do not consider it good public relations to admit evidence on the assumption that it is relevant and material when the hearing examiner and the agency know such is not the case and ignore the evidence in deciding the case.

The kind of evidence petitioners seek to have admitted is of course pertinent to a hearing looking to the promulgation of an order or to amendment. Petitioners are free to petition for an amendment of the order. At such a hearing all interested parties such as producers and handlers of milk from the Western Shore disposed of on the Eastern Shore may have their say in testimony also, as well as Eastern Shore handlers not involved in this proceeding and Eastern Shore producers who do not deliver to the petitioning

[1] Section 7 of the Administrative Procedure Act, 5 U.S.C. § 1006(c).

handlers here, none of whom can be parties to this quasi-judicial proceeding concerned with alleged *illegality* of the order.

In view of the foregoing, the hearing examiner's protested rulings are now upheld. But this is an interlocutory appeal and petitioners may renew their objections in filing exceptions, if they do so, to the hearing examiner's report and they may submit a statement as an offer of proof in connection with the proffered testimony of Malin.

Done at Washington, D.C., August 29, 1960.

THOMAS J. FLAVIN, *Judicial Officer.*

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, provides in pertinent part as follows:

7 U.S.C. 601

> It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

7 U.S.C. 602

> It is declared to be the policy of Congress—
>
> (1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.
>
> * * * * * * *

7 U.S.C. 608a(6)

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623 and 624 of this title, in any proceeding now pending or hereafter brought in said courts.

* * * * * *

7 U.S.C. 608c(1)

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C. 608c(2)

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except products of naval stores and the products of honeybees), or to any regional or market classification, or any such commodity or product: Milk. * * *

7 U.S.C. 608c(3)

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order

will tend to effectuate the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

7 U.S.C. 608c(4)

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title with respect to such commodity.

7 U.S.C. 608c(5)

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payments to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval, or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk pur-

chased by him at the prices fixed in accordance with paragraph (A) of this section.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pur-

suant to paragraph (A) of this subsection for such milk.

* * * * *

7 U.S.C. 608c(7)

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of this section and necessary to effectuate the other provisions of such order.

7 U.S.C. 608c(8)

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such orders have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

7 U.S.C. 608c(9)

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing

area specified therein tends to prevent the effectuation of the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers, who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

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7 U.S.C. 608c(11)(B)

Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary

finds practicable, consistently with carrying out such declared policy.

7 U.S.C. 608c(12)

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

7 U.S.C. 608c(13)(A)

No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title shall be applicable to any producer in his capacity as a producer.

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7 U.S.C. 608c(15)(A)

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance

with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B). The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling; provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to the subsection shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection.

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7 U.S.C. 608c(18)

The Secretary of Agriculture prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain

the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

7 U.S.C. 608c(19)

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of sections 601–604, 607–608a, 608b, 608c, 608d, 608e–1 to 612, 613, 614–619, 620, 623 and 624 of this title, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production,

as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

* * * * *

7 U.S.C. 1301

(a) For the purposes of this subchapter and the declaration of policy—

(1) (A) The "parity price" for any agricultural commodity, as of any date, shall be determined by multiplying the adjusted base price of such commodity as of such date by the parity index as of such date.

(B) The "adjusted base price" of any agricultural commodity, as of any date, shall be (i) the average of the prices received by farmers for such commodity, at such times as the Secretary may select during each year of the ten-year period ending on the 31st of December last before such date, or during each marketing season beginning in such period if the Secretary determines use of a calendar year basis to be impractical, divided by (ii) the ratio of the general level of prices received by farmers for agricultural commodities during such period to the general level of prices received by farmers for agricultural commodities during the period January 1910 to December 1914, inclusive. As used in this subparagraph, the term "prices" shall include wartime subsidy payments made to producers under programs designed to maintain maximum prices established

under the Emergency Price Control Act of 1942.

(C) The "parity index," as of any date, shall be the ratio of (i) the general level of prices for articles and services that farmers buy, wages paid hired farm labor, interest on farm indebtedness secured by farm real estate, and taxes on farm real estate, for the calendar month ending last before such date to (ii) the general level of such prices, wages, rates, and taxes during the period January 1910 to December 1914, inclusive.

(D) The prices and indices provided for herein, and the data used in computing them, shall be determined by the Secretary, whose determination shall be final.

(E) Notwithstanding the provisions of subparagraph (A) of this paragraph, the transitional parity price for any agricultural commodity, computed as provided in this subparagraph, shall be used as the parity price for such commodity until such date after January 1, 1950, as such transitional parity price may be lower than the parity price, computed as provided in subparagraph (A) of this paragraph, for such commodity. The transitional parity price for any agricultural commodity as of any date shall be—

(i) its parity price determined in the manner used prior to the effective date of the Agricultural Act of 1948, less

(ii) 5 per centum of the parity price so determined multiplied by the number of full calendar years (not counting 1956 in the case of basic agricultural commodities) which, as of such date, have elapsed after January 1, 1949, in the case of non-basic agricultural commodities, and after January 1, 1955, in the case of the basic agricultural commodities.

(F) Notwithstanding the provisions of subparagraphs (A) and (E) of this subsection, if the parity price for any agricultural com-

modity, computed as provided in subparagraphs (A) and (E) of this subsection appears to be seriously out of line with the parity prices of other agricultural commodities, the Secretary may, and upon the request of a substantial number of interested producers shall, hold public hearings to determine the proper relationship between the parity price of such commodity and the parity prices of other agricultural commodities. Within sixty days after commencing such hearing the Secretary shall complete such hearing, proclaim his findings as to whether the facts require a revision of the method of computing the parity price of such commodity, and put into effect any revision so found to be required.

(G) Notwithstanding the foregoing provisions of this section, the parity price for any basic agricultural commodity, as of any date during the six-year period beginning January 1, 1950, shall not be less than its parity price computed in the manner used prior to October 31, 1949.

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7 U.S.C. 1301(c)

The latest available statistics of the Federal Government shall be used by the Secretary in making the determinations required to be made by the Secretary under this chapter.

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